Supreme Court, U. S.
FILED
JUL 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1678

FEDERAL POWER COMMISSION, *Petitioner,*

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *et al.*

Brief *Amicus Curiae* of Elizabethtown Gas Company in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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July 1976

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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This brief *amicus curiae* is filed, with the consent of the parties, pursuant to Rule 42.

Elizabethtown Gas Company (Elizabethtown) is a petitioner in two of the four pending Court of Appeals cases cited by the Federal Power Commission (FPC) in support of its petition for writ of certiorari.[1] Neither case warrants grant of the petition.[2] Nor do the unique

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[1] Petition for Writ, p. 10, n. 4: *Elizabethtown Gas Company* v. *Federal Power Commission;* C.A.D.C. No. 75-1767; *Transcontinental Gas Pipe Line Corporation* v. *Federal Power Commission,* C.A.D.C. Nos. 74-2036, *et al.*

[2] On May 23, 1976, the Court of Appeals (Circuit Judges MacKinnon and Robb) specifically denied the FPC's motion in No.

facts involved in the Fifth Circuit decision justify review.[3]

STATEMENT

Elizabethtown is a public utility distributing natural gas in 68 communities serving over 183,000 consumers under regulation by the New Jersey Board of Public Utility Commissioners. Elizabethtown has been in the gas distribution business for 125 years. Prior to the initiation of natural gas service by an interstate pipeline supplier in 1951, Elizabethtown manufactured the gas that it sold to consumers.

Elizabethtown currently purchases natural gas for resale from three interstate pipeline companies:[4] Columbia Gas Transmission Corporation (Columbia), Texas Eastern Transmission Corporation (Texas Eastern) and Transcontinental Gas Pipe Line Corporation (Transco). All of the wholesale service being provided to Elizabethtown by these pipeline companies was certificated by the FPC as firm, long-term service, required by the public convenience and necessity.

Each pipeline supplier is heavily curtailing service to Elizabethtown due to gas supply shortages on its its system:

75-1767 to hold the review in abeyance pending consideration of this petition for writ of certiorari.

[3] *Mississippi Public Service Commission* v. *Federal Power Commission*, 522 F.2d 1345 (5th Cir. 1975), *reh. denied en banc*, 526 F.2d 816 (5th Cir. 1976).

[4] Elizabethtown serves a very small market in Sussex County, New Jersey, which is not connected to the rest of its system. This is supplied with natural gas purchased from a fourth pipeline company, Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Tenneco).

Pipeline	Curtailment 1975-1976 winter (actual)	Curtailment 1976 summer (estimated)	Curtailment 1976-1977 winter (estimated)
Columbia	28%	41%	26.5%
Texas Eastern	14%	28%	17%
Transco	35%	43%	39%

Elizabethtown has been advised that *next winter it will receive no gas from either Texas Eastern or Transco to meet the base requirements of its industrial consumers. Columbia anticipates that it will curtail 93% of Elizabethtown's industrial base requirements attributable to that pipeline supplier.*

The pipeline shortages being experienced by Elizabethtown are continuous, year round and worsening. Faced with this erosion, Elizabethtown has sought to obtain a proportionate share of the dwindling pipeline supplies. It has not been entirely successful in this. The curtailment plans in effect on the systems of its pipeline suppliers have been interim plans which are largely the result of negotiations among the pipeline's wholesale customers.[5] In no case has a final curtailment plan been imposed by the FPC on the basis of an evidentiary record.

Recognizing an obligation to assist other gas distribution companies to adjust to the mounting pipeline supply shortages, Elizabethtown has agreed to settle for less than a proportionate share of the available

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[5] The "pipelines sell all the gas they can during periods of shortage and consequently are not overly concerned with which customers receive it." *Pacific Gas and Electric Co.* v. *Federal Power Commission*, 506 F.2d 33, 36 (D.C. Cir. 1974).

pipeline supply where there was provision for compensation which

(1) would redress it and its consumers for the economic burden arising from the need for Elizabethtown to provide expensive supplemental gas supplies to make up the additional pipeline supply deficit caused by the disproportionate allocation, and

(2) would provide an economic goal to induce the distribution company obtaining more than a proportionate share of the pipeline supply to acquire supplemental gas supplies so that it would not claim a disproportionate share of the natural gas in the future.

The compensation provisions in past curtailment plans, approved by the FPC, served those objectives. Provision was made for the payment of compensation by the distribution company customers receiving a disproportionate share of the pipeline gas to the distribution company customers receiving less. This mitigating factor permitted the plans to comply with the anti-preference provisions of Section 4(b) of the Natural Gas Act. 15 U.S.C. 717c(b).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

1. The four cases pending in the Courts of Appeal cited by the FPC[6] do not justify the grant of the petition for a writ of certiorari. Instead, they demonstate that the Fifth Circuit decision involved circumstances so unique that this Court should allow that case to be

[6] Petition for Writ, n. 4.

remanded to the FPC, without further comment, for the hearing which the FPC never afforded the Mississippi Public Service Commission.

This Court is not presented with a question germane to the problem of compensation in the context of Elizabethtown's pipeline suppliers.[7]

The Mississippi power plants are served directly by United Gas Pipe Line Company (United Gas).[8] Post World War II developments along the Gulf Coast resulted in United Gas serving directly a large number of rural industrial plants and electric power stations. Elizabethtown's pipeline suppliers, by contrast, make virtually no such sales:[9]

[7] The same can be said of the pipeline suppliers involved in the other two court of appeals cases cited by the FPC in note 10 of its petition for writ. Consolidated Gas Supply Corporation (C.A.D.C. No. 75-1324) serves *no* direct industrial customers. See FPC, *Statistics of Interstate Natural Gas Pipeline Companies 1973*, 303. Northwest Pipeline Corporation (C.A.D.C. No. 75-1455) serves four direct industrial customers which accounted for only 1.3% of its total sales in 1974. See *Annual Report of Northwest Pipeline Corporation to FPC for the year ended December 31, 1974*, 514.

[8] See *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972).

[9] Data for 1973 from Federal Power Commission, *Statistics of Interstate Natural Gas Pipeline Companies 1973*, 303, 309 and 310 (1974). Tenneco, supplier to Elizabethtown's system in Sussex County, made 0.14% of its sales in 1973 to direct industrial customers. *Id.* at 309.

Pipeline	Number of direct Industrial Customers	Direct Industrial Sales as Percentage Of Total Sales
United Gas Pipe Line Co.	212	23.7%
Columbia Gas Transmission Corp.	1	0.5%
Texas Eastern Transmission Corp.	0	0%
Transcontinental Gas Pipe Line Corp.	1	0.3%

It may be appropriate to speak of "low-priority pipeline customers" and "high-priority pipeline customers" in a context where one is comparing one direct industrial sale with another being made by a pipeline supplier like United Gas. But that terminology, used by the FPC in its statement of the "Question Presented" to this Court, is not applicable to the sales made by Elizabethtown's pipeline suppliers.

Columbia, Texas Eastern and Transco sell gas to wholesale customers which serve consumers in hundreds of communities. Each wholesale customer serves a market of residential, commercial and industrial consumers. No two markets are alike. One cannot on that account call one wholesale customer a "low-priority pipeline customer" and another a "high-priority pipeline customer". Every wholesale customer serves residential and commercial consumers which are considered to be high-priority end users.

2. United Gas has been curtailing firm service on its system since November 1970. None of the interim curtailment plans in effect since then has contained a com-

pensation provision.[10] The appropriateness of inclusion of such a provision in a permanent curtailment plan on the United Gas system is now being tried in a hearing before an Administrative Law Judge of the FPC.[11]

By contrast, compensation provisions were included for several years in the interim curtailment plans of Elizabethtown's suppliers Columbia and Transco with FPC approval.[12] Such action was justified by the Commission in these terms:[13]

> "According to Columbia, the $1.65/Mcf surcharge provides an incentive to its customers to develop their own peak shaving facilities, tends to preclude customers from requesting exempt volumes except when actually needed to protect firm non-industrial loads, and compensates customers providing the exempt volumes for utilizing their peak shaving facilities. In any case, the cost of operating peak shaving equipment approximates the $1.65 surcharge. . . ."

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[10] The Courts have been called upon to review FPC determinations that United's interim curtailment plans were lawful. In each case, the FPC was reversed. See *State of Louisiana* v. *Federal Power Commission*, 503 F.2d 844 (5th Cir. 1974); *Louisiana Power & Light Co.* v. *Federal Power Commission*, 526 F.2d 898 (5th Cir. 1976).

[11] In *United Gas Pipe Line Co.*, FPC Docket Nos. RP71-29, *et al.* (Phase II), Mississippi Power & Light Co. distributed on May 12, 1976 the proposed testimony of Witness Norris L. Stampley in support of compensation. This witness has yet to appear for cross-examination.

[12] See *Columbia Gas Transmission Corporation*, 48 F.P.C. 647 (1972); *Transcontinental Gas Pipe Line Corporation*, 46 F.P.C. 1212, 1213 (1971), 48 F.P.C. 1060, 1061 (1972).

[13] 48 F.P.C. at 650. The interim plan, with its compensation feature, was approved after the FPC found it "appropriate in carrying out the provisions of the Natural Gas Act."

What is involved in Elizabethtown's pending appeals is the *deletion* of compensation provisions without proper reference to the history of approval, the record evidence justifying continuation of the practice, or the role of compensation in insuring the continued viability of the local gas distribution industry.

3. This Court has ruled that curtailment plans are to be adjudged under the anti-preference provisions of Section 4(b) of the Natural Gas Act.[14] This requires careful consideration of the facts in each case.

Take the all too common situation where one of a pipeline's wholesale customers insists on receiving more than a proportional share of the available gas because it has not taken the steps necessary to assure that sufficient supplemental gas supplies will be on hand to meet the demands of consumers it serves which are not ready to turn to another form of energy. The pipeline supplier can deliver the requested larger volume only if other wholesale customers are in a position to get along with less gas either because they have made provision for expensive supplemental gas supplies or they are prepared to forego for a time certain of their sales.

Consumers sometimes must be protected against a lack of far-sighted arrangements by their public utility

[14] 15 U.S.C. 717c(b). See *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. at 642. Section 4(b) provides:

> "No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service."

suppliers. When that occurs, a preference is afforded in the curtailment plan to the wholesale customer to tide it over the difficulty.

How is the preference thus created in favor of the imprudent customer to be ameliorated so that an undue prejudice is not inflicted on other wholesale customers in violation of Section 4(b) of the Natural Gas Act?

If the favored wholesale customer could "payback" the excess volumes by taking less gas from the pipeline supplier at another time of the year, the prejudice to other customers might not be undue. But pipeline curtailments are now so deep that that form of offset to an undue preference is no longer practical.[15]

It is well to remember that the interstate pipeline companies regulated by the FPC are not public utilities. They enjoy no monopoly in providing gas service in any part of the country.[16] Nor do they have the concommitant obligation to serve. As their natural gas supplies dry up, they withdraw from the scene. The FPC's responsibilities fade away simultaneously, as it cannot commandeer a gas supply for an interstate pipeline nor oblige it to continue service when its committed reserves are gone.[17]

The wholesale customers of the pipelines cannot shed their public utility service obligations that easily.

[15] *Consolidated Edison Co. of New York* v. *Federal Power Commission*, 512 F.2d 1332, 1343 (D.C. Cir. 1975).

[16] See Sections 7(a) and 7(g) of the Natural Gas Act, 15 U.S.C. 717f(a) and 717f(g); *Granite City Steel Co.* v. *Federal Power Commission*, 320 F.2d 711 (D.C. Cir. 1963).

[17] See *Public Service Commission of New York* v. *Federal Power Commission*, 463 F.2d 824, 830 (D.C. Cir. 1972); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 204 F.2d 675, 679 (3d Cir. 1953).

It may make sense, for a time, for such wholesale customers to give up a part of their pipeline supply to another public utility in difficulties. But there must be redress for the consequential economic injury and a built-in incentive for the advantaged public utility to assume its proper burden of meeting local market requirements from supplemental gas supplies of its own devising. Compensation provisions, properly designed, serve both purposes.[18]

4. If the FPC can find good reasons why compensation should not be paid to "low-priority" electric power plant customers to off-set the loss of their natural gas supplies, those reasons can and should be developed on an evidentiary record. The issue should not be decided by blindly striking out compensation provisions in curtailment plans of all pipeline companies regardless of design, purpose, circumstance, or reference to Section 4(b) of the Natural Gas Act.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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[18] See n. 13 *supra*. Compensation payments do not originate with the pipeline company. They are not surrogates for the payment of damages by the pipeline arising out of a shortage caused by negligence, bad faith, improvidence or breach of contract. See *Monsanto Co.* v. *Federal Power Commission*, 463 F.2d 799, 808 (D.C. Cir. 1972).